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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May a local governmental agency limit the distance of non-stop airline flights, in view of section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1), which prohibits states and interstate agencies from regulating the "rates, routes, or services of any air carrier"?

2. Do the "proprietary powers" of airport operators preserved by section 105(b)(1) of the Airline Deregulation Act, 49 U.S.C. app. § 1305(b)(1), include the power to impose an extraterritorial restriction upon the distance of non-stop flights?

3. Does a local governmental agency operating airports have any jurisdiction over the use made by airlines of airport "landing slots" granted by the FAA under 14 C.F.R. §§ 93.121-93.133?

PARTIES INVOLVED

The parties to this proceeding in the courts below were Western Air Lines, Inc., and the Port Authority of New York and New Jersey. On April 1, 1987, after final briefing and argument in the Court of Appeals, Western Air Lines, Inc. merged with Delta Air Lines, Inc. This petition is brought by Delta Air Lines, Inc., as the surviving company following the merger.*

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* The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc. are Atlantic Southeast Airlines, Inc.; Comair, Inc.; and Gatwick Handling, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Delta Air Lines, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on April 22, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported at 817 F.2d 222, is reproduced in the appendix at pp. 19a-27a. The District Court's opinion, reported at 658 F. Supp. 952, is reproduced in the appendix at pp. 1a-18a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 22, 1987.

(App. 19a.) The Court of Appeals denied a timely petition for rehearing on May 28, 1987. (App. 28a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

49 U.S.C. app. § 1305(a)(1):[1]

> Except as provided in paragraph (2) of this subsection [relating to Alaska], no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. app. § 1305(b)(1):

> Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier cer-

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[1] Since its 1982 edition, the official version of United States Code has presented title 49 in a main portion (containing sections enacted into positive law) and in an appendix (containing other sections). The sections of title 49 referred to in this petition are contained in chapter 20, which has not yet been enacted into positive law, and are therefore cited to the appendix. The bound volumes of U.S.C.A. and U.S.C.S. and the current pocket part to U.S.C.A. present chapter 20 (the sections of which are uniquely numbered) in the main portion of title 49.

tificated by the Board to exercise its proprietary powers and rights.

STATEMENT

In 1978, Congress enacted the Airline Deregulation Act, ending forty years of pervasive federal economic regulation of commercial aviation under the auspices of the Civil Aeronautics Board ("CAB"). Pub. L. No. 95-504, 92 Stat. 1705 (1978). Premised on a declaration that "maximum reliance [should be placed] on competitive market forces and on actual and potential competition," the Act provided that deregulation would occur over a seven-year period during which requirements that air carriers obtain prior CAB approval of the rates they charged, the routes they served, and the services they provided would be eliminated in phases. 49 U.S.C. app. §§ 1302(a)(4), 1551. While federal economic regulation was eliminated, the Federal Aviation Administration ("FAA") remained responsible for managing the nation's airspace.

To prevent local authorities from regulating what Congress intended to deregulate, the Act included preemption provisions which, with certain limited exceptions, explicitly preempted regulations "relating to rates, routes, or services of any air carrier." 49 U.S.C. app. § 1305(a)(1). At the same time, the Act preserved the then-existing "proprietary powers and rights" of local entities operating airports. 49 U.S.C. app. § 1305(b)(1).

Since deregulation, the airline industry has grown substantially. With flexibility in rates and fares, existing airlines expanded and new ones emerged. Passenger miles grew 61.5% between 1978 and 1986 and takeoffs and landings rose 28.0%. In this atmosphere,

competition heightened and fares dropped, in many cases dramatically. AIRLINE TRANSPORT ASS'N, AIR TRANSPORT—1987: THE ANNUAL REPORT OF THE U.S. SCHEDULED AIRLINE INDUSTRY 2 (1987).

At the time this action was commenced, Western Air Lines operated daily flights out of a hub located in Salt Lake City, Utah,[2] and, after Western's merger with Delta Air Lines, Delta continues those operations today. A hub is an airport used by an airline as its central point of origination for connecting flights. By coordinating flights through a hub, an airline can serve various city pairs that cannot be served economically on a non-stop basis.[3]

In 1984, respondent, the Port Authority of New York and New Jersey, adopted a rule that established the maximum permissible distance of non-stop flights into and out of LaGuardia Airport at 1500 miles.[4] The stated purpose of the rule is to "reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting traffic to Newark and Kennedy."[5]

In order to compete effectively in the New York City airline market, Western determined that it must provide nonstop service to LaGuardia from its Salt Lake City hub. LaGuardia is one of four high-traffic

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[2] App. 2a, 658 F. Supp. at 953.

[3] *Id.*

[4] *See id.* ("Prior to 1984, the perimeter rule at LaGuardia was an informal one . . . .").

[5] *Id.* The Port Authority also operates Newark and Kennedy International Airports. *Id.*

airports[6] where arrivals and departures are limited by the FAA through the use of "slots".[7] Accordingly, Western applied for and received several highly desirable slots at LaGuardia in a March 27, 1986, lottery conducted by the FAA. (App. 20a, 817 F.2d at 223.)

Upon receiving these slots, Western requested the Port Authority to allow it to commence non-stop service between LaGuardia and Salt Lake City. The Port Authority denied those requests solely because Salt Lake City is 1,989 miles from LaGuardia. As a consequence, the Port Authority allows Western's (and now Delta's) biggest competitors for air traffic in the Rocky Mountain region (United and Continental) to fly directly between their Denver hubs and LaGuardia,[8] while it allows Delta to serve LaGuardia from its Salt Lake City hub only by use of connecting flights, greatly increasing travelling time and making such routes noncompetitive. Accordingly, Delta is effectively precluded from serving LaGuardia, a vital segment of the New York City market, from its Salt Lake City hub.

On August 13, 1986, Western filed suit in the United States District Court for the Southern District

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[6] The other three high-traffic airports using the "slot" system are Kennedy International Airport, O'Hare International Airport and Washington National Airport. 14 C.F.R. § 93.123 (1987).

[7] A "slot" is the authority to conduct one instrument flight rule landing or takeoff during a specific period. At LaGuardia, a slot allows a takeoff or landing within a thirty minute period. App. 1a, 658 F. Supp. at 953.

[8] Although Denver is 1,638 miles from LaGuardia, the Port Authority has adopted an exception to the perimeter rule to allow non-stop flights to Denver. App. 2a, 658 F. Supp. at 953-54.

of New York challenging LaGuardia's perimeter rule under section 105(a) of the Deregulation Act, 49 U.S.C. app. § 1305(a),[9] and 42 U.S.C. § 1983. The subject matter jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

On September 3, 1986, after a one-day bench trial, the district court denied Western's request for injunctive relief, and dismissed the action. Although the district court ruled that the perimeter rule affected "rates, routes and services" and therefore fell within section 105(a)'s ambit of preemption, it nonetheless upheld the Port Authority's direct and extraterritorial limitation on non-stop flights. The court held that section 105(b) permits a local governmental airport proprietor to impose such rules provided they are "reasonable in light of the legitimate objectives sought to be achieved." (App. 13a-14a, 658 F. Supp. at 959.) Noting the Port Authority's claim that business travellers create less congestion than do vacationers and that the perimeter rule tends to encourage business travel at LaGuardia and to divert vacationers to other airports, the district court ruled that the Port Authority's decision "was not unreasonable." (App. 17a, 658 F. Supp. at 960.)[10]

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[9] Western also asserted claims under 49 U.S.C. app. § 1349(a) (prohibiting exclusion of air carriers from airport facilities) and 49 U.S.C. app. § 2210(a) (the fair treatment provisions of the Airport and Airway Improvement Act of 1982).

[10] It should be noted that all of Florida, probably New York's largest vacation destination, is within the perimeter and is served by many flights from LaGuardia. The Port Authority presented no evidence demonstrating that longer flights, such as New York-Salt Lake City, carry more vacation travellers or create more congestion than flights within the perimeter, such as New York-

Western appealed to the United States Court of Appeals for the Second Circuit. On April 22, 1987 that court affirmed, adopting the rationale of the district court's decision in all respects. With regard to the section 105 preemption issue, the Second Circuit held that "at least when enacted by a multi-airport proprietor such as the [Port] Authority, [a perimeter rule] falls within the proprietary powers of airport operators exempted from preemption by section 1305(b)(1)."[11] While both the Second Circuit and the district court alluded to the fact that the Port Authority runs Newark and Kennedy International Airports as well as LaGuardia, neither court explained how that fact exempted the Port Authority from the express preemption of section 105.

REASONS FOR GRANTING THE WRIT

I. By Sanctioning Local Regulation of Airline Routes as the Exercise of a "Proprietary Power," the Decision Below Conflicts in Approach with Decisions of this and Other Courts.

In enacting the Airline Deregulation Act of 1978, Congress made fundamental changes to the manner in which the airline industry operates and is regulated. Noting that forty years of intensive economic regulation by the Civil Aeronautics Board had resulted in inflexible, inefficient, and noncompetitive operation of the airlines, Congress determined that

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Florida flights. Moreover, as noted in n. 8, *supra*, the Port Authority has adopted an exception to the perimeter rule to allow flights from LaGuardia to Denver, another major vacation destination, even though Denver is more than 1600 miles from LaGuardia.

[11] App. 27a, 817 F.2d at 226.

competition and market forces should determine where airlines will fly and at what price to the public.[12]

During the period of CAB regulation, it was clear that regulation of interstate airline rates, routes, and services by local governments was preempted.[13] Congress continued this preemption through section 105(a)(1) of the Airline Deregulation Act, which expressly provides that—

> no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. app. § 1305(a)(1). Thus, local governments were expressly prohibited from regulating what Congress deregulated.

The courts below recognized that perimeter rules adopted as local *governmental* regulations are preempted by section 105(a). But the courts erro-

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[12] H.R. Rep. No. 1211, 95th Cong., 2d Sess. 2-5, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3737-41; H.R. Rep. No. 793, 98th Cong., 2d Sess. 2-3, *reprinted in* 1984 U.S. Code & Admin. News 2857, 2858-59; *see also* 49 U.S.C. app. § 1302(a)(3),(4),(9).

[13] *See, e.g., Railway Express Agency v. CAB*, 345 F.2d 445, 449 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 879 (1965) ("Under the Federal Aviation Act, the [CAB] is given exclusive authority and responsibility for the economic regulation of the air transportation industry . . . .").

neously held that local governments may achieve this result in their *proprietary* capacity as airport operators. In making this distinction, the courts below relied on section 105(b)(1) of the Act, a provision which was enacted in response to a concern that section 105(a) might prevent local governments owning airports from continuing to exercise their then-existing powers to deal with strictly local problems, such as noise and other environmental problems.[14]

Instead of recognizing the limited scope of the powers reserved to local governmental airport proprietors, the decision below held that they are free to adopt rules which directly regulate rates, routes, and services, so long as the means chosen are "reasonable

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[14] Thus, Dr. William J. Ronan, Chairman of the Port Authority, submitted the following statement to the Senate subcommittee concerning section 105:

> The Port Authority is concerned that this provision may unintentionally impair airport operators' proprietary rights. We understand the object of the provision to be the prevention of states expanding their air transportation regulatory activities at the same time that Federal regulaions [sic] are being loosened. However, its vague wording could be misleading. Specifically, the prohibition against local governmental laws, regulations or standards "relating to" rates, routes and services could be interpreted as limiting the airport operator's *rights to levy charges and promulgate operational regulations* if they are deemed to be "related to" rates, routes and services. Any Federal preemption provisions should therefore state clearly that it [sic] is not intended to infringe on airport operators' proprietary rights.

Regulatory Reform in Air Transportation: Hearings Before Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess., pt. 4, at 1990 (1977) (statement of Dr. William J. Ronan) (emphasis added).

in light of the legitimate [local] objectives sought to be achieved."[15] The decision below significantly expands the scope of the "proprietary powers" established by prior decisions and constitutes judicial legislation that seriously undercuts the economic deregulation scheme enacted by Congress.

A. This Court's decision in *City of Burbank*

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), this Court held invalid a city's attempt to limit airport noise by imposing a curfew on takeoffs and landings. This Court noted the broad scope of federal preemption of aviation matters:

> "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."

Id. at 633-34 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944)). The decision in *Burbank* recognized that aviation requires "a uniform and exclusive system of federal regulation." 411 U.S. 634-35, 639.

In footnote 14, however, *Burbank* noted the "proprietary powers" exception to broad federal preemption in aviation matters. That exception, as later elaborated by the Courts of Appeals, allows local governmental airport proprietors to regulate the manner in which their airports are used in order to limit noise

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[15] App. 13a-14a, 658 F. Supp. at 959.

and other environmental problems.[16] The Courts of Appeals have considered this power necessary to allow airport proprietors to protect themselves from liability to neighboring landowners for inverse condemnation under *Griggs v. Allegheny County*, 369 U.S. 84 (1962).[17]

Never before, however, has a court construed the proprietary power exception to allow a local governmental airport operator to regulate extraterritorially airline activities that do not occur on the airport's grounds and that do not give rise to any prospect of liability by the airport operator.

B. The decision of the Ninth Circuit in *San Diego Unified Port District*

In deciding that the "proprietary powers" exception permits a local governmental airport proprietor to regulate airline routes and other extraterritorial matters so long as the regulation is "reasonable," the decision below conflicts with the decision in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). In that case, the Ninth Circuit ruled that the proprietary powers exception applies only to regulations imposed by a local governmental agency that are designed to limit the agency's liability arising from its operation

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[16] *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *see also San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1316-19 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *British Airways Board v. Port Authority*, 564 F.2d 1002, 1010 (2d Cir. 1977) ("extremely limited [proprietor's] role").

[17] *See* authorities cited in n. 16, *supra*.

of the airport.[18] The Ninth Circuit's approach is in sharp contrast to that of the decision below, which would permit any local rule that is said to be reasonably designed to address any local problem, without regard to whether local governmental liability might ensue and without regard to its direct effect on rates, routes, or services.

II. The Decision Below Imperils the Congressional Objective of Airline Deregulation.

The decision below also departs from established precedent by granting extraterritorial jurisdiction to local government airport operators and by permitting them to regulate airline rates, routes, and services *directly*. Past decisions, as well as the legislative history of section 105(b), proceeded on the basis that regulations based on an airport operator's proprietary powers would be limited to the proprietary boundaries of the airport and would only *incidentally* affect rates, routes, and services.

By permitting direct local regulation of the length of non-stop flights and thus of rates, routes, and services, the decision below undercuts the federal plan of deregulation. A principal goal of deregulation was to provide abundant, affordable, and convenient air service. This goal was to be achieved by allowing rates, routes, and services to be governed by market forces, not by governmental regulations. Perimeter

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[18] 651 F.2d 1316-17, 1319. Thus, the Ninth Circuit stated that "*City of Burbank*'s proprietor exception looks to who will pay for the taking of air easements." *Id.* at 1319. The court found that because the state agency seeking to regulate did not operate the airport, it could not invoke the proprietary powers exception. *Id.* at 1316-19.

rules, however, thwart this goal by directly prohibiting air carriers from flying where passengers wish to go. Instead, such rules require airlines to make arbitrary and unnecessary intermediate stops on long flights. The ultimate effect is to make air service unnecessarily inconvenient and expensive by prohibiting airlines from offering routes that the market desires but that an airport operator deems undesirable. If widely adopted by local airport authorities, perimeter rules will greatly reduce the availability of direct flights and accordingly will balkanize the nation's airline system.[19]

Moreover, the rationale of the decision below permits a broad range of local governmental regulations covering all phases of airline operations. Thus, the rationale would justify a local governmental airport proprietor in adopting measures intended to reduce ground congestion that reach far beyond the airport's boundaries. For example, a local airport proprietor could discourage vacation travel (which the Port Authority claims its perimeter rule is designed to do) by prohibiting airlines from offering discount fares to vacation travellers. Similarly, a proprietor could limit congestion by limiting the number of passengers airlines may carry, by regulating schedules, or by restricting the amount of baggage that airlines may carry for each passenger.

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[19] This effect would not be reduced significantly if application of the decision below were limited to multi-airport proprietors. Many cities, either directly or through local governmental airport authorities, operate both a principal airport and one or more smaller "satellite" airports. Route limitations at any major airport, based solely on the desires of the local airport operator, do serious harm to the Congressionally mandated market-based system for air travel.

Until the decision below, the fundamental inconsistency between economic deregulation and local rules governing where airlines may fly, such as perimeter rules, was well recognized. As the Civil Aeronautics Board informed Congress during the deregulatory process:

> Enactments by state and local governments relating to routes, rates and services are specifically preempted by the Deregulation Act. What that means, for example, is that an airport may not place procedural hurdles in the path of new air service which have the effect of preventing, or seriously inhibiting, a carrier's management from instituting new service reasonably promptly. *It also means that a local airport authority cannot decide that service to Denver or Salt Lake City is more important than more service to San Francisco. Such actions would thwart deregulation and run counter to the ground rules established by Congress.*

Burbank, Calif., Airport—Noise and Safety Problems: Hearings Before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. at 263 (1980) (statement of Civil Aeronautics Board, presented by Gloria Schaffer) (emphasis added). Thus, under the administrative interpretation of section 105, extraterritorial or direct regulations of routes are not exercises of proprietary powers and are invalid.[20]

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[20] As the courts below apparently recognized, the decision in *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982), is not to the contrary. That decision approved a 1000-mile perimeter

This interpretation is embodied in both federal regulations[21] and administrative decisions. In *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644 (1979), the CAB rejected a claim by the governmental agency operating Dallas/Fort Worth Regional Airport and Dallas' Love Field that it could divert all interstate flights from Love Field to Dallas/Fort Worth by use of its proprietary powers under section 105(b). Finding that section 105(b) "was not intended to give airport operators additional proprietary rights," *id.* at 652, the CAB adopted a decision which found that the prohibition on interstate flights at Love Field "conflict[ed] with the provisions and policies of the Act and [was] therefore invalid." *Id.* at 688.[22]

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rule at National Airport, which was then operated by the FAA, based upon the fact that section 105 by its terms did not apply to federal agencies. *Id.* at 1194.

In the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, §§ 6001-6012, 100 Stat. 3341, 3341-376 to 3341-388, the FAA was authorized to lease National Airport to the newly-formed Metropolitan Washington Airports Authority. A central purpose of that Act was to place National Airport on par with other major airports by giving proprietary control over the airport to a local governmental authority. *Id.* §§ 6002(4), (5), (6), (8). Apparently recognizing the inability of the local airport authority to continue the FAA's perimeter rule, Congress itself enacted the perimeter rule in section 6012 of the Act, at the same time expanding the perimeter to 1250 miles. *See also* 14 C.F.R. § 93.253 (1987).

[21] 14 C.F.R. § 399.110(f) (1987) (proprietary powers must be exercised "in a manner that does not conflict with the provisions and policies of the [Airline Deregulation] Act").

[22] In the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, Sec. 503, 94 Stat. 35, 59-60 (1980), Congress included the so-called "Love Field Amendment," which adopted a legislative compromise prohibiting flights between Love

Thus, the decision below sharply conflicts not only with prior court decisions, but also with applicable federal administrative regulations and precedent.[23]

III. This Court Should Grant Review to Preserve the Exclusive Role of the FAA to Manage the Nation's Airspace.

By permitting local governments to adopt and to enforce their own regulations of airline rates, routes, and services, the decision below seriously hampers the FAA's ability to carry out its duty to promote efficient use of the nation's airspace. 49 U.S.C. app. § 1348. The FAA's need to have broad powers unencumbered by local regulations is particularly acute in view of the remarkable success of the Airline Deregulation Act. Since the Act, there are more flights, more convenient routes and schedules, and more affordable fares. This success, however, has placed a heavy strain on our aviation system.

The FAA, as the federal agency responsible for overseeing the use of the nation's airspace, has taken a variety of steps to deal with these concerns. The FAA has limited congestion at high-traffic airports,

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Field and points outside a four-state area. Significantly, the House Conference Report reaffirmed the general applicability of the preemption provisions of section 105, referred to the Love Field situation as "unique in the air transportation industry," and stated, "Acceptance of this compromise should therefore not be taken as a harbinger of any similar proposals for any other airport or area." H.R. Conf. Rep. No. 716, 96th Cong., 2d Sess. 26, *reprinted in* 1979 U.S. Code Cong. & Admin. News 78, 88.

[23] These regulations and decisions have, in effect, been ratified by Congress, since the recent statutory provision with respect to airports in the Washington, D.C., area would not be necessary if the Second Circuit here were correct. *See* n. 20, *supra*.

including LaGuardia, by instituting a slot system under which landings and takeoffs by commercial air carriers are allocated among airlines. 14 C.F.R. §§ 93.211-93.229 (1987). The FAA could have awarded those slots on the basis of a perimeter rule or some other route-based criterion, but instead determined that slots should be awarded without regard to rates, routes, or services.[24] In so doing, the FAA preserved the effects of market forces to the maximum extent possible. At the same time, unnecessary takeoffs and landings at intermediate points entailed by perimeter rules were avoided.

In establishing a perimeter rule at LaGuardia, the Port Authority has undermined these goals. As this Court recognized in striking down the landing curfew in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the FAA must be allowed to continue its exclusive control over use of the airspace without interference from rules made by local governments:

> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. . . . We are not at liberty to diffuse the powers given by Congress to FAA

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[24] *See* Special Federal Aviation Regulation No. 48, 51 Fed. Reg. 8632, 8635, 8637-38 (Mar. 12, 1986) (allocation by lottery; slots only restricted to domestic passanger use).

> . . . by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

411 U.S. at 639-40. By upholding LaGuardia's perimeter rule, the decision below lets the Port Authority in on the planning and dilutes the FAA's ability to regulate congestion through its slot system and other measures. As stated in *City of Burbank*, such dilution of the FAA's authority should be done only with Congressional authorization.[25]

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[25] Congress did specifically authorize perimeter rules at National Airport and Love Field. *See* nn. 20 & 22, *supra*. But there is no such Congressional authorization here.

CONCLUSION

Absent certiorari being granted, federal regulation of the airline industry will be replaced by the regulation of fifty states and countless airport authorities and the mandate of Congress to deregulate may be voided by the decision below. The petition for certiorari should be granted.

Respectfully submitted,

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August, 1987

APPENDIX

APPENDIX A

WESTERN AIR LINES, INC.,

Plaintiff,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant,

No. 86 Civ. 6259 (JMC).

United States District court,
S.D. New York.

Sept. 3, 1986.

Roger M. Deitz, New York City, for plaintiff.
Patrick J. Flavey, New York City (Arthur P. Berg, Jay Adlai Selcov, of Counsel), for defendant.

OPINION

CANNELLA, District Judge:

After a nonjury trial on the merits, plaintiff's claims for preliminary and permanent injunctive relief are dismissed. Fed. R. Civ. P. 65(a)(2).

FACTS

Plaintiff Western Airlines ["Western"] brings this action against defendant Port Authority of N.Y. & N.J. ["Port Authority" or "Port"], seeking preliminary and permanent injunctive relief against enforcement by the Port of its so-called perimeter rule. The undisputed facts are as follows.

Western is the holder of several slots at LaGuardia Airport ["LaGuardia"]. Each slot permits Western to conduct one landing or takeoff operation during a 30-minute period.

Western obtained these slots in a lottery conducted by the Federal Aviation Administration ["FAA"] on March 27, 1986 and will lose them unless it commences service at LaGuardia by September 17, 1986.

Western maintains its hub in Salt Lake City. The hub permits the airline to serve city pairs by one stop or connecting flights when such city pairs cannot be served economically on a point-to-point nonstop basis. Western intended to begin operating three daily nonstop flights in each direction between LaGuardia and Salt Lake City on September 3, 1986.

The Port Authority operates Kennedy International Airport ["Kennedy"], LaGuardia, and Newark International Airport ["Newark"]. Since the late 1950's, the Port has had a perimeter rule at LaGuardia, which forbids airlines using LaGuardia to run nonstop flights beyond a set distance. The stated purpose of the rule is to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark. Of the three airports operated by the Port, LaGuardia is the smallest with 662 acres, followed by Newark with 2300 acres, and Kennedy with 4930 acres. Neither Newark nor Kennedy is subject to a perimeter restriction.

Prior to 1984, the perimeter rule at LaGuardia was an informal one, prohibiting most international operations, and nonstop operations in excess of 2000 miles. In 1984, the Port Authority set in place a formal rule, which reduced the permissible distance for nonstop operations to 1500 miles. The new rule does permit flights to Denver, although Denver is more than 1600 miles from LaGuardia. According to the Port Authority, Denver was "grandfathered" under the new rule because there had been continuous nonstop service between LaGuardia and Denver since 1981 and that service accounted for a significant portion of LaGuardia operations. At the time the rule was adopted, three air carriers operated LaGuardia-Denver service.

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Salt Lake City is located almost 2000 miles from LaGuardia. Western now serves Salt Lake City with two daily round-trip flights at Kennedy. Because Western believes that LaGuardia serves a lucrative business market, it has sought permission from the Port authority, in May 1985 and again in early 1986, to conduct New York-Salt Lake City operations from LaGuardia. The Port has denied permission on the basis of the perimeter rule.

In this action, Western alleges that the perimeter rule violates various federal aviation statutes[1] and the Civil Rights Act of 1871,[2] and is invalid under the Supremacy,[3] Equal Protection,[4] Due Process,[5] and Commerce[6] clauses of the United States Constitution. On August 19 and September 2, 1986, the Court held a full hearing on the merits, consolidating plaintiff's claims for preliminary and permanent injunctive relief pursuant to Fed.R.Civ.P. 65(a)(2). For reasons that follow, Western's claims are dismissed.

DISCUSSION

Western's principle contentions center on three federal aviation statutes: Section 105(a)(1) of the Deregulation Act, 49 U.S.C. § 1305(a)(1) ["Section 1305(a)(1)"]; the Airport & Airway Improvement Act, 49 U.S.C. § 2210 ["Section 2210"]; and the Federal Aviation Act of 1958, 49 U.S.C. § 1349(a) ["Section 1349(a)"]. Section 1305(a)(1) is a preemption statute. It provides:

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or

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[1] 49 U.S.C. §§ 1305(a)(1), 1349(a), 2201 *et seq.*

[2] 42 U.S.C. § 1983.

[3] U.S. Constitution, Art. VI, cl. 2.

[4] U.S. Constitution, Amendment XIV.

[5] *Id.*

[6] U.S. Constitution, Art. I, Sect. 8, cl. 3.

> more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Sections 2210 and 1349(a) respectively require that an airport proprietor receiving federal funds (1) make its facilities available to the public on fair and reasonable terms and without unjust discrimination, and (2) not grant to any air carrier an exclusive right to use the facilities.

Western contends that the perimeter rule violates Section 1305(a)(1) and thus the Supremacy Clause because the rule is a regulation of Western's "routes and services." Western also argues that the rule impermissibly discriminates against Western in violation of the Commerce Clause and Sections 2210 and 1349(a) because it permits flights to Denver but not to Salt Lake City. Finally, Western asserts that the rule places an undue burden on interstate commerce.[7]

The Port Authority argues that Western has failed to state a cause of action. It points to *Montauk-Caribbean Airways v. Hope*, 748 F.2d 91 (2d Cir. 1986), which held that neither Section 1305(a)(1) nor 1349(a) confers a private right of action, and implied the same for Section 2210.[8] Western claims that even if it has no private action

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[7]Western makes no argument with respect to its claims under the Civil Rights Act or the Equal Protection & Due Process clauses and the Court does not consider these claims. See Local Civil Rule 3(b); *see also Midway Airlines v. County of Westchester*, 584 F.Supp. 436, 441 n. 18 (S.D.N.Y.1984).

[8]The Court did not address the issue with respect to Section 2210, but affirmed the district court's dismissal of the claim. It also cited favorably to *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F.Supp. 667, 673 (N.D.Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir.1984). In *Hill Aircraft* the court considered both Section 1349(a) and Section 1718, 49 U.S.C. § 1718, the predecessor to Section 2210. The court

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under the statutes it may still sue to invalidate the perimeter rule under the Supremacy Clause. In this respect, Western maintains, the statutes demonstrate the preemptive force of federal legislation in the area of aviation. The Port Authority responds that such an argument merely circumvents the rule in *Montauk* and, if adopted, would render that decision meaningless.

The Court finds the Port Authority's argument unpersuasive and contrary to the *Montauk* decision itself. In *Montauk,* the plaintiff sought to operate as a fixed-base operator and air carrier on a year-round basis at an airport owned by the Town of East Hampton. Pursuant to a lease with the Town, the plaintiff was limited to seasonal operations. Plaintiff sought to modify the lease but the town denied its request. Plaintiff then challenged the Town's actions both under the federal aviation statutes at issue here and on antitrust grounds.

The district court dismissed the complaint. On appeal, the Second Circuit rejected the claims under the Sherman Act. The court reasoned that N.Y.Gen.Mun.Law § 352, which permits municipal airport operators to enter into exclusive lease arrangements, constitutes a clearly expressed state policy authorizing municipalities to pursue anticompetitive activity. Consequently, the court held, the Town was immune from the antitrust challenge by virtue of the state action doctrine.

The plaintiff then argued that Section 1305(a) preempted state law in this area and thus there was no state authorization for the anticompetitive activity. The court rejected this argument, but on the merits, holding that the Town's actions fit an exception to Section 1305(a) preemption. *See* 784 F.2d at 96–97. The court therefore drew a

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concluded there to be no private right of action under either section. Subsequently, the Eleventh Circuit, which had affirmed the district court's opinion in *Hill Aircraft,* squarely addressed Section 2210, and held there to be no private right of action.

distinction between a Supremacy Clause challenge and a private right of action. *See also New York Airlines v. Dukes County*, 623 F.Supp. 1435 (D.C. Mass. 1984) (distinguishing private cause of action from a Supremacy Clause challenge).

This Court concludes that *Montauk* does not foreclose Western's Supremacy Clause challenge to the extent that it relies on Section 1305(a)(1) preemption. However, the Court finds no support for such a challenge in Sections 1349(a) or 2210. Unlike Section 1305(a)(1), which renders void as preempted any regulation affecting "routes or services" not contemplated by that section, Sections 1349(a) and 2210 merely impose obligations on airport proprietors.[9] Although these sections may have some relevance in demonstrating the extent of federal preemption,[10] Western's

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[9] It is difficult to see how Section 1305(a)(1) could give rise to a cause of action when that section creates no rights or obligations.

[10] The supremacy clause, U.S. Const., art VI, cl. 2, invalidates state laws that "interfere with or are contrary to" federal law. *Gibbons v. Ogden*, 9 Wheat 1, 211, 6 L.Ed. 23 (1824). Congress may preempt state law by an express provision. *Jones v. Rath Packing Co.* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, *reh'g denied*, 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240 (1977). In addition, an intent to preempt state law may be inferred where Congress has enacted a sufficiently comprehensive scheme of federal regulation or where the federal interest is dominant so as to preclude state legislation in the same area. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 280, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *see Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Where Congress has not acted to supersede completely regulation by the states, state law is nullified to the extent that it conflicts with federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-43, 83 S.Ct. 1210, 1216-18, 10 L.Ed.2d 248, *reh'g denied*, 347 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963). *See generally Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 105

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attempt to establish a violation of these sections amounts to a private right of action, which is not permitted.

Turning to Western's Supremacy Clause challenge, Section 1305(a)(1), as previously noted, establishes federal preemption in the field of "rates, routes and services" of air carriers. The Port Authority's perimeter rule may be fairly characterized as a regulation touching this area and the Port advances no significant arguments to the contrary. The Port does argue that its perimeter rule is nonetheless valid under Section 1305(b)(1), 49 U.S.C. § 1305(b)(1) ["Section 1305(b)(1)"], which provides:

> Nothing is subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

The extent of "proprietary powers and rights" has not as yet been established. The legislative history of Section 1305(b)(1) indicates that the airport proprietor would be permitted to take those actions "presently accepted as valid exercises of proprietary powers." 124 Cong.Rec. 18799 (remarks of Sen. Kennedy). The issue has most frequently arisen in the context of noise regulations.

In *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), the Court struck down a municipal ordinance which imposed a curfew on jet air traffic at a local airport. The Court focused on Section 611 of the Federal Aviation Act, 49 U.S.C. § 1431, which, as the Court put it, represents a "comprehensive scheme of federal control of the aircraft noise problem." *Id.* at 629. The Court ruled the

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S.Ct. 2371, 85 L.Ed.2d 714 (1985).

New York Airlines v. Dukes County, 623 F.Supp. 1435, 1441 (D.C.Mass.1985).

ordinance preempted due to the "pervasive nature of the scheme of federal regulations of aircraft noise." *Id.* at 633. Expressly left open, however, was the question whether there is any limitation on an airport proprietor's ability to regulate noise. *See id.* at 636 n. 14. In this respect, the Court noted a letter by the Secretary of Transportation, quoted with approval in the Senate Report on Section 611, which expressed the view that

> The proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport,* from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Id. at 635 (emphasis in original).

Several courts that have since considered the viability of the proprietor exception alluded to in *City of Burbank* have held such an exception to exist. *See, e.g., Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100, 103 (9th Cir. 1981); *British Airways Bd. v. Port Authority,* 558 F.2d 75, 83 (2d Cir. 1977). In *British Airways Bd.,* our Court of Appeals upheld the Port Authority's temporary ban on SST flights at Kennedy Airport pending the promulgation of reasonable regulations establishing acceptable noise levels for the airfield. The court relief on the legislative history of Section 611, in particular the history cited to in *City of Burbank,* and concluded that it was Congress' intent to permit proprietor regulations in the field of noise, despite the otherwise total federal preemption in this area.

The court also indicated limits on an airport proprietor's power. It said that the proper domain of the airport proprietor is to establish regulations regarding "the permis-

sible level of noise which can be created by aircraft using the airport." 558 F.2d at 84. In a subsequent decision, *British Airways Bd. v. Port Auth.*, 564 F.2d 1002 (2d Cir. 1977) [*"British Airways Bd. II"*], the court reiterated its conclusion that airport proprietors have an "extremely limited role" in the system of aviation regulation 564 F.2d at 1010.

Western seizes upon the above-quoted language and argues that noise regulation is the only recognized exception to the otherwise total federal preemption of aviation. Although the cited language is quite narrow, *British Airways Bd.* and *British Airways Bd. II* were principally concerned with Section 611, the noise statue, and whether Congress, in enacting that section, intended that airport proprietors be permitted to regulate noise. The cases do not reject the existence of other proprietary interests, but merely seek to insure that when such an interest exists, such as the control of noise, the proprietor not regulate beyond the scope of that interest.[11]

Section 1305(b)(1) does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind. As Judge Weinfeld said in *Midway Airlines v. County of Westchester*, 584 F.Supp. 436 (S.D.N.Y. 1984), "[t]he legislative history is unmistakably clear that Congress did not intend that the preemptive force of 49 U.S.C. § 1305(a)(1) would interfere with 'long recognized powers of the airport operators to deal with noise and other environmental problems at the local level.' " *Id.* at 440 n. 18 (quoting 124 Cong. Rec. 37419 (1978) (remarks of Sen. Kennedy)). Judge Weinfeld interpreted *British Airways II*

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[11]Even in this respect the Second Circuit has recently upheld a regulation which limited the cumulative level of noise exposure at an airport rather than the decibel levels of individual take-offs and landings. *See Globel Int'l Airways Corp. v. Port Authority*, 727 F.2d 246 (2d Cir, 1984).

as holding that airport proprietors may issue reasonable rules pertaining to the permissible level of noise *or other danger* which can be caused by aircraft using the airport. *Id.* at 441. He went on to uphold an airport proprietor's temporary refusal to grant airport access for a reasonable period necessary to "develop rational and nondiscriminatory rules for allocating scarce space and landing and takeoff slots." *Id.* at 440.

In another airport capacity case, *Aircraft Owners & Pilots Ass'n v. Port authority,* 305 F.Supp. 93 (E.D.N.Y.1969), Judge Dooling upheld the Port Authority's imposition of a "takeoff" fee on certain small aircraft for the purpose of reducing airport congestion. The court specifically noted that the fee was imposed to divert air traffic during the busiest periods of the day but recognized this as a legitimate basis for regulation.

As these cases make plain, although questions of permissible noise regulation predominate in the courts, other proprietor-imposed regulations are "presently accepted as valid exercises of proprietary powers." A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest.

In *City of Houston v. FAA,* 679 F.2d 1184 (5th cir. 1982), the court considered a 1000-mile perimeter rule imposed by the FAA at Washington National Airport ["National"]. The FAA owns both National and Dulles International Airport. For reasons markedly similar to those of the Port Authority, the FAA imposed its perimeter restriction.

The Fifth Circuit upheld the rule. It first noted that section 1305(a)(1), which preempts state regulation, does not restrict the powers of the FAA, an arm of the federal

government. The court then proceeded to decide the case on alternative grounds. Although holding that the FAA had power to impose a perimeter based on its authority under the Federal Aviation Act alone, it also held, as an independent ground, that the FAA's proprietary interest was sufficient to justify the rule. The court implied that the result might have been different had the proprietor not been the FAA, and cited to the Second Circuit's language in *British Airways Bd. II* that airport proprietors have an "extremely limited role" in aviation management. Nonetheless, the court carefully distinguished Pacific Southwest Airlines v. County of Orange, No. CV 81-3248 (C.D.Cal. Nov. 30, 1981), a case which held that a local airport proprietor could not impose a 500-mile perimeter rule, saying: "A local airport with no connection to nearby Los Angeles International or Ontario Airports, [the proprietor] could not blithely take such an action upon itself." *Id.* at 1194.

Here, as in *City of Houston,* there is in issue a multi-airport system. The effect of the perimeter rule in each case is to divert air traffic from one airport to another within the respective systems, and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter. This court sees no real distinction between the FAA's interest, as proprietor of an airport system, to manage its congestion problems by use of a perimeter rule, and the interest of the Port Authority, as proprietor of LaGuardia, Kennedy, and Newark, to do the same.

Of course, the FAA, acting as airport proprietor, is likely to promulgate rules that are compatible with the overall scheme of federal regulation. This factor undoubtedly played a role in the *City of Houston* decision. However, no aspect of federal aviation is more heavily regulated than the field of noise and yet in this area local limitations are permitted. The Second Circuit in *British Airways Bd.* evaluated the reasons for permitting a proprietor to reg-

ulate noise. It first noted that airport proprietors are liable for compensable takings resulting from unreasonable airport use and therefore should have the ability to protect themselves. 558 F.2d at 83. The court went on to say "[i]t is perhaps more important ... that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access." *Id.* This reasoning applies with equal force to the control of ground congestion. The court in *City of Houston* recognized a legitimate proprietary function. This Court concludes that, in the absence of conflict with FAA regulations,[12] a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor.

This does not end the inquiry, however, for as the Second Circuit has instructed in *British Airways Bd.*, 558 F.2d at 84-85, and again in *British Airways Bd. II*, the airport operator is circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest. The Court must "carefully scrutinize all exercises of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." *British Airways Bd. II*, 564 F.2d at 1011.

The Court first dispenses with Western's claim that the perimeter rule unreasonably discriminates against Western. Western contends that permitting flights to Denver, while not allowing nonstop flights to places such as Salt Lake City, discriminates against all air carriers with hubs

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[12]Although the FAA has imposed High Density Regulations to reduce air traffic at LaGuardia, Western points to no conflict between these regulations and the perimeter rule. *Cf. Globel Int'l Airways Corp. v. Port Authority*, 727 F.2d 246 (2d Cir.1984) (noise regulation).

beyond the 1500-mile point. Western points out that its major competitors, which operate from LaGuardia, use a Denver hub and thus Western is unable to compete effectively with these airlines. Western does not argue that the Denver exception was created with the purpose of favoring certain airlines, and has offered no evidence which would tend to show that the "grandfathering" of Denver was in any other way improper. From Western's point of view, therefore, it would have been no different had the perimeter rule been set at 1700–miles, thereby encompassing Denver.

As the court in *City of Houston* said in a somewhat different context but in terms no less applicable here:

> The accident of geography, not any deliberate discrimination against the western states, underlies the FAA's rule. The perimeter does not discriminate against a named state or states. It does not declare that Texans may not fly nonstop to National. Rather, it sets a limit of 1000 miles on nonstop flights. Some states, e.g. Louisiana, straddle the line. Some Louisiana airports meet the requirement, others do not. Just as the Rocky Mountain states possess beautiful scenery, Texas its reservoirs of oil and natural gas, and California its sandy beaches, so the accident of geography places some states within 1000 miles of National and others beyond. The perimeter rule, . . . for geographic reasons has an incidental effect on air travel from certain states.

679 F.2d at 1198.

In truth, all regulations tend to discriminate in some way, *see, e.g., Global Int'l Airways v. Port Authority,* 727 F.2d 246 (2d Cir. 1984); *Aircraft Owner's & Pilots Ass'n v. Port Authority,* 305 F.Supp. 93 (E.D.N.Y.1969). The critical inquiry is whether that discrimination is unjust; or to put it another way, whether the discrimination is rea-

sonable in light of the legitimate objectives sought to be achieved.

On the issue of reasonableness, as previously discussed, the Port Authority implemented the perimeter rule to reduce groundside congestion and maintain LaGuardia as a short and medium haul airport, and an airport catering to business customers. The Post believes that opening LaGuardia to long range aircraft, and with it the leisure traveler, would reduce runway capacity, increase delays, result in increasing congestion at the gates, place a heavier demand on ticketing, baggage claim facilities and public areas, increase use of parking lot facilities and cause roadway and terminal frontage access to become more congested. In the Port's view, the short haul or business traveler moves more quickly through the airport with less luggage and fewer "meters and greeters". It is for similar reasons that the FAA imposed a perimeter at National Airport. *See City of Houston,* 679 F.2d 1184.

A brief survey of the evidence shows that the Port's conclusions are not unfounded. In 1984 the Port authority staff commenced an evaluation of the perimeter rule. Included in this evaluation was a study of LaGuardia's capacity. The study concluded that at "current traffic levels LaGuardia Airport is operating near or above its capacity in major components of the airport system including CTB apron area and certain passenger processing areas, departure roadway and access roadways, during peak periods. The delays and congestion which are currently being experienced during these periods are symptomatic of this condition." Defendant Ex. D, Attachment III at 11. Similarly, a study performed on the LaGuardia airside capacity concluded that "[d]espite the constant near-capacity utilization, LaGuardia does experience hours when traffic exceeds the airport capacity by as much as 23 percent." Defendant Ex. D, Attachment II at 3. Another study observed that LaGuardia "is fast approaching saturation in many areas, with ground access the major constraint. . . .

[A]dditional passenger growth can be expected." *See Ex.* D, Attachment I at 2.

At the hearing, Mr. George Howard, the Port authority's Assistant Director for Aviation, testified that elimination of the rule would result in an increase of 1.5 million passengers, including a higher percentage of long haul passengers. The result would be more use of parking lot and baggage handling facilities as well as greater congestion at the terminal. Tr. at 91. According to the staff study, it was anticipated that some 27 daily roundtrip flights to Los angeles, San Francisco, Seattle, San Diego, San Juan, Bermuda, Calgary, Nassau and St. Croix would likely be introduced at LaGuardia if the perimeter rule were discarded. *See* Defendant Ex. C at 10.

The Port Authority staff also circulated questionnaires to airlines, the FAA, the Department of Transportation and the State Department. The questionnaires sought comment on four possible alternatives for the perimeter rule: (1) retention of a 2000-mile policy; (2) imposition of a 1500-mile rule; (3) imposition of a 1500-mile rule with continued service to cities currently served; and (4) imposition of a 1000-mile rule. The majority of those responding favored retention of some form of perimeter restriction. *See* Plaintiff Ex. 16.

The staff ultimately recommended a 1500-mile rule. Its report notes that about 20 percent of the survey respondents favored a 1500-mile rule with most of the group favoring continuing service to cities currently served. The report concluded:

> After assessing the survey results and the objections raised by respondents, staff affirms its tentative conclusion that the interests of the public and the airlines are best served by the continuation of some type of perimeter policy, particularly in view of the limited physical facilities and other inherent limitations of LaGuardia Airport and the larger capacities at Ken-

> nedy International and Newark International Airports. However, in view of the concerns expressed by the State Department and suggestions by several carriers and other parties for modification of the rule, staff recommends that the current interim rule be modified by reducing the mileage radius from 2,000 statute miles to 1,500 statute miles but allowing the continuation of service to Denver, expand the current policy to permit non-stop flights to such Canadian cities as Winnipeg which already have preclearance facilities as well as to other Canadian cities within 1,500 statute miles of LaGuardia which may acquire preclearance facilities in the future This would exclude Calgary which is beyond 1,500 statute miles and where although service was recently instituted the stipulation entered into by the parties gives Air Canda no vested rights.

Defendant Ex. A at P-3.

Western contends that the rule does not achieve its purpose and that reducing the perimeter to 1500 miles was a purely arbitrary act.[13] However, the Port Authority conducted a careful study and review of its policy and concluded that a 1500-mile rule was necessary to meet increasing congestion problems. It is important to keep in mind that at the time of the study, which reflected increasing airport use, there was already in place an informal 2000-mile perimeter. Survey results indicated that the majority of those responding favored some form of perimeter policy and 20 percent favored a 1500-mile rule. In setting in place a formal rule, therefore, and in light of

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[13]To the extent Western argues that the Port Authority should have created an exception for Western in light of the fact that the market Western seeks to serve is compatible with the Port Authority's designs for LaGuardia, Western should seek relief pursuant to Sections 1349(a) and 2210. In this respect Western's remedy is with the FAA. *See Montauk)Caribbean Airways v. Hope,* 784 F.2d 91 (2d Cir.1986).

the prospect of ever burgeoning traffic at LaGuardia, it was not unreasonable to impose a 1500-mile limit. This is especially true when access to the New York area remains unimpeded at the other area airports.

> As Justice Holmes once remarked: when a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself, without regard to the necessity behind it, the line or point seems arbitrary. It might as well, or nearly as well, be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 41, 48 S.Ct 423, 426, 72 L.Ed. 770, 775 (1928) (Holmes, J., dissenting), *quoted in City of Houston,* 679 F.2d alt 1193. Although Western contends that there were other means available to reduce the congestion problem, this Court will not second guess the actions of the Port Authority as long as they are reasonable. The Court finds them to be so in the instant case.[14]

CONCLUSION

For the foregoing reasons, Western's claims for preliminary and permanent injunctive relief are dismissed. Fed.R.Civ.P. 65(a)(2). The Clerk of the Court is directed

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[14]The Court notes Western's objection to the introduction of Defendant's Exhibits B and F. Although these exhibits were received for nonhearsay purposes, the Court did not rely on them in any event.

to enter judgment for the defendant and dismiss the complaint.

SO ORDERED.

Appendix B

WESTERN AIR LINES, INC.,
Plaintiff-Appellant,
v.
PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,
Defendant-Appellee,

No. 829, Docket 86-7859.

United States Court of Appeals,
Second Circuit

Argued Feb. 19, 1987

Decided April 22, 1987.

Allyn O. Kreps, Los Angeles, Cal. (Jones, Day, Reavis & Pogue, William T. Drescher, Robert DeBerardine, Robert Layton, Thomas L. Abrams, Jones, Day, Reavis & Pogue, New York City, of counsel), for plaintiff-appellant.

Arthur P. Berg, Atty., The Port Authority of New York and New Jersey, for defendant-appellee.

Before FEINBERG, Chief Judge, TIMBERS and PRATT, Circuit Judges.

FEINBERG, Chief Judge:

Western Air Lines, Inc. (Western) appeals from a judgment of the United States District Court for the Southern District of New York, after a bench trial before John M. Cannella, J., that dismissed its complaint seeking an injunction.—F.Supp.—(S.D.N.Y.1986). Western argues that a "perimeter rule," promulgated by the Port Authority of New York and New Jersey (the Authority), is preempted by a provision of the Airline Deregulation Act, 49 U.S.C.

§ 1305(a)(1) and violates the substantive provisions of two other aviation statutes, 49 U.S.C. §§ 1349(a) and 2210(a). Western also appeals from the dismissal of its claims for enforcement of the aviation statutes under 42 U.S.C. § 1983. Substantially for the reasons stated by the district court, we affirm the dismissal of the complaint.

Background

The Authority owns and operates LaGuardia, Kennedy International and Newark International Airports. In order to reduce ground congestion at LaGuardia, by far the smallest of the three airports, the Authority uses a perimeter rule. The current rule prohibits, with certain exceptions, non-stop flights to or from LaGuardia in excess of 1500 miles. The Authority believes that business travelers create considerably less airport congestion than vacationers and uses the perimeter rule to encourage the use of LaGuardia by business people, who often make relatively short trips, and the use of Newark and Kennedy for vacation flights.

The Federal Aviation Administration (the FAA) limits flights to and from LaGuardia through the use of "slots," each of which authorizes one landing or takeoff by the holder during a thirty-minute period. Western obtained several slots at LaGuardia as a result of a lottery conducted by the FAA. Western sought to use these slots for three daily non-stop flights in each direction between LaGuardia and Salt Lake City, where Western has a "hub." A hub is an airport used by an airline as the central point of its connecting flights. Airlines use hubs to connect two cities that cannot be served economically by non-stop flights. On the basis of its perimeter rule, however, the Authority refused Western permission to conduct LaGuardia-Salt Lake City operations, since Salt Lake City is more than 1,500 miles from LaGuardia.

In the district court, Western's effort to enjoin the perimeter rule centered on three federal aviation statutes:

49 U.S.C. § 1305, which limits local authority to regulate airlines' "rates, routes of services."[1] 49 U.S.C. § 2210(a), which requires an airport proprietor receiving federal funds to make its facilities available on a reasonable and nondiscriminatory basis,[2] and 49 U.S.C. § 1349(a), which pro-

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[1]49 U.S.C. § 1305 provides in relevant part:

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

. . . .

(b) Proprietary powers and rights

(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

[2]49 U.S.C. § 2210 provides, in relevant part:

(a) Sponsorship

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and combined passenger and cargo flights or all cargo flights,and such classification or status as tenant shall

hibits such proprietors from granting exclusive access to any airline.[3] Western claimed that there is an implied private right of action under each statute; Western also relied on 42 U.S.C. § 1983. Western also claimed that under the

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not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on tenant air carriers, and (B) each fixed-based operator at any airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport utilizing the same or similar facilities, and (C) each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized by the airport or permitted by the airport to serve any air carrier at such airport.

[3] 49 U.S.C. § 1349 provides, in relevant part:

(a) No Federal funds, other than those expended under this chapter,shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Secretary of Transportation that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Secretary of Transportation, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended. For purposes of the proceeding sentence, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

Supremacy Clause, the perimeter rule was preempted by section 1305(a)(1).

The district court, relying on our holding in *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir.), cert. denied, —— U.S. ——, 107 S.Ct. 248, 93 L.Ed.2d 172 (1986), ruled that the statutes relied on by Western do not provide a private right of action. In addition, the court dismissed Western's claims under section 1983 for lack of prosecution. The district court did find that Western could assert its preemption claim based on the Supremacy Clause. On the merits, however, it found that the Authority's perimeter rule was not preempted by section 1305.

Discussion

In *Montauk-Caribbean*, we held that there are no implied private rights of action to enforce sections 1349(a) and 1305(a). 784 F.2d at 97–98. We are, of course, bound by that decision, fairly construed. The district court correctly recognized that our analysis in *Montauk-Caribbean* applies equally to a suit claiming an implied right of action to enforce section 2210(a).[4] See also *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 14–16 (1st Cir.1987); *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489, 1490–91 (11th Cir.1985). We also held in *Montauk-Caribbean* that sections 1305(a) and 1349(a) cannot be enforced through section 1983. 784 F.2d at 98. That holding would require dismissal of Western's section 1983 claims with respect to sections 1305(a) and 1349(a) in this case. We need not decide, however, whether there is a persu-

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[4]Indeed, the district court decision in *Montauk-Caribbean*, which this court affirmed, concluded that section 2210(a) does not provide a private right of action. See *Montauk-Caribbean Airways, Inc. v. Hope*, No. 85-CV-420, slip op. at 10—11 (E.D.N.Y.Sept. 4, 1985), aff'd, 784 F.2d 91 (2d Cir.), cert, denied, —— U.S. ——, 107 S.Ct. 248, 93 L.Ed.2d 172 (1986).

asive basis for reaching a different conclusion with respect to section 2210(a), see *New York Airlines, Inc. v. Dukes County,* 623 F.Supp. 1435 at 1443–48 (D.Mass.1985), because Judge Cannella did not abuse his discretion in holding that Western did not press its section 1983 claims in the district court.

Despite the lack of a private right of action to enforce the statutes, the district court held that Western could bring a Supremacy Clause challenge to the perimeter rule by claiming that the rule is preempted by section 1305(a)(1). The Authority argues that the absence of a private right to enforce section 1305(a)(1) requires dismissal of Western's Supremacy Clause claim. The Authority argues that *Montauk-Caribbean* settles the issue because the preemption claim based directly on section 1305(a)(1) that the *Montauk-Caribbean* court refused to recognize implicitly relied on the Supremacy Clause. The Authority also argues that as a general matter, the Supremacy Clause by itself cannot create a right of action. Although we recognize the potential anomaly of rejecting a private right of action to enforce a statute while allowing a claim under the Supremacy Clause that the statute preempts a local regulation, we find that Western properly brought its Supremacy Clause claim.

As a preliminary matter, we note that whether the Supremacy Clause will support a suit claiming that section 1305(a)(1) preempts a local regulation was not ruled upon in *Montauk-Caribbean.* The plaintiff in that case made no claims directly under the Supremacy Clause.[5] Our holding that a private party has no implied right of action to enforce the substantive provisions of section 1305(a)(1) did not decide whether a private party can allege that a local

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[5]Indeed, plaintiff's petition for rehearing conceded that its prior argument "may not have adequately emphasized ... the Supremacy Clause."

regulation is preempted by section 1305(a)(1) on Supremacy Clause grounds.

A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law. "The primary function of the Supremacy clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments. . . ." *White Mountain Apache Tribe v. Williams,* 810 F.2d 844, 848 (9th Cir.1987). A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity. In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law. It provides remedies, frequently including damages, for violations of federal law by a government entity or by a private party. The mere coincidence that the federal law in question in this case contains its own preemption language does not affect this distinction.

For example, in *Rollins Environmental Services (FS), Inc. v. Parish of St. James,* 775 F.2d 627 (5th Cir.1985), plaintiff's Supremacy Clause claim was based on a provision of the toxic Substance Control Act, 15 U.S.C. §§ 2601–2629, that like section 1305(a)(1), explicitly preempts certain state regulation. See 15 U.S.C. § 2617. Even though the section of the Act providing private rights of action did not provide for suit for violation of the preemption section, see 15 U.S.C. § 2619, the court, relying on the Supremacy Clause, considered the effect of the preemption provision. *See Rollins,* 775 F.2d at 631, 632–37. Similarly, in *New York Airlines Inc. v. Dukes County,* 623 F.Supp. at 1441–43, 1450 n. 13, the court held that section 1305(a)(1) provides a basis for a Supremacy Clause challenge to an airport regulation, but that it does not provide a private right of action.

In arguing that the Supremacy Clause does not provide a cause of action, the Authority mistakenly relies on *White Mountain Apache Tribe v. Williams,* 798 F.2d 1205 (9th Cir.1986), cert. denied, —— U.S. ——, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).[6] In that case, the court distinguished actions for an injunction based on the Supremacy Clause from private rights of action to enforce the Supremacy Clause under section 1983:

> The question whether the Supremacy Clause (U.S.Const. art. VI cl. 2) may be used as a sword in bringing a § 1983 action is, of course, different from that decide [in the affirmative] by the Supreme Court in [*White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)]—whether the Supremacy Clause may be invoked as a shield against the imposition of state taxes on . . . operations heavily regulated by the federal government.

810 F.2d at 847. The court held that although the Supremacy Clause can be used to enjoin enforcement of a state statute that runs afoul of a federal legislative scheme, it does not provide a basis for a claim under section 1983. Thus, *White Mountain* highlights the distinction between a Supremacy Clause claim and other private rights of action. See also *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk,* 604 F.Supp. 1084, 1089–91 (S.D.N.Y.1985), aff'd, 813 F.2d 570 92d Cir.1987) (per curiam). Indeed, many courts have considered Supremacy Clause challenges to local airport regulations without determining whether there was a private right of action from another source. See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); *Pirolo v. City of Clearwater,* 711 F.2d 1006

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[6]The Ninth Circuit withdrew this version of its opinion and replaced it with an amended opinion, *White Mountain Apache Tribe v. Williams,* 810 F.2d 844 (9th Cir.1987). The portions of the Ninth Circuit's opinion relevant to this appeal, however, were substantially unchanged.

(11th Cir.1983). Accordingly, the district court was correct in examining Western's Supremacy Clause claim.

Turning to the merits, we affirm on the basis of Judge Camella's well-reasoned opinion, to which we refer the reader, holding that the Authority's perimeter rule is not preempted by section 1305. Although, as Judge Cannella recognized, the perimeter rule may be a regulation "relating to . . . routes" within the meaning of section 1305(a)(1), we agree with his conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls within the proprietary powers of airport operators exempted from preemption by section 1305(b)(1). Cf. *City of Houston v. FAA*, 679 F.2d 1184, 1196 (5th Cir.1982).

Western's other contentions require little discussion. In its reply brief on appeal Western argues, apparently for the first time, that the FAA, by granting slots, has preempted any regulation of those slots by the Authority. The statute, however, authorizes the Authority to regulate those slots in accordance with its proprietary powers. Since the district judge did not err in finding that the perimeter rule is within those proprietary powers, Western's contention fails. Western's remaining claims, that it was improperly denied an opportunity to cross-examine the Authority's witness at trial and that it is entitled to a new trial because the district court made inadequate findings of fact and conclusions of law, are without merit.

Accordingly, the judgment of the district court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of May one thousand nine hundred and eighty-seven.

WESTERN AIR LINES, INC.,
Plaintiff-Appellant,

V

PORT AUTHORITY OF NEW YORK and NEW JERSEY,
Defendant-Appellee.

Docket No. 86-7859

A petition for rehearing containing a suggestion that the action be reheared in banc having been filed herein by counsel for the Appellant WESTERN AIR LINES INC.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk